The Constitutional Jurisprudence of Justice Kennedy on Liberty

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I. Introduction

Justice Anthony Kennedy has served as an Associate Justice of the Supreme Court of the United States since February 18, 1988. During his more than 20 years on the Court, he has often been the swing vote – particularly since Justice O’Connor’s retirement in 2005. He has been in the middle of the action, because he is not part of the block of four liberal Justices (Stevens (now Kagan), Souter (now Sotomayor), Ginsburg, and Breyer), nor is he part of the block of four conservative Justices (Roberts, Scalia, Thomas, and Alito). Justice Kennedy sometimes votes with one block and sometimes the other. Scholars have attempted to predict which way Justice Kennedy will vote, and efforts have been made by advocates to construct arguments to attract his favor.¹

¹ For example, during the 2006 term Justice Kennedy was in the majority in all 24 cases decided by a 5-4 vote, while during the 2007 term he was in the majority in 8 of the 12 cases decided 5-4. See Richard G. Wilkins, Scott Worthington, Elisabeth Liljenquist, Adam Pomeroy, Amy Pomeroy, Supreme Court Voting Behavior: 2007 Term, 37 Hastings Const. L.Q. 287 (2010); Richard G. Wilkins, Scott Worthington, Peter J. Jenkins & Elisabeth Liljenquist, Supreme Court Voting Behavior: 2006 Term, 36 Hastings Const. L.Q. 51 (2008). See also Erwin Chemerinsky, The Kennedy Court, 9 Green Bag 335, 335 (2006) (“Justice Anthony Kennedy is clearly the swing vote and likely will determine the outcome of most high profile cases so long as these remain the nine Justices . . . .”); R. Randall Kelso & Charles D. Kelso, Swing Votes on the Supreme Court: The Joint Opinion in Casey and Its Progeny, 29 Pepp. L. Rev. 637 (2002).

This article has a different focus than either prediction or advocacy. We describe how the concept of constitutionally protected liberty has been developed and applied in Justice Kennedy’s opinions, and how he has sought to cushion the impact on liberty of Court decisions that have sustained the exercise of governmental power in ways that limit liberty. Time and again in his judicial opinions, Justice Kennedy has implemented the declaration in the Preamble that the people are attempting to “secure the Blessings of Liberty to ourselves and our Posterity.” Further, he has implemented vigorously the Fifth and Fourteenth Amendment protections against federal or state deprivations of liberty without due process of law, a form of protection that includes substantive as well as procedural aspects.

As discussed in this article, Kennedy’s vision of the concept of liberty embodied in the Constitution derives from an understanding of 18th-century Enlightenment philosophy, based on writers such as John Locke and Adam Smith, as developed in the 19th century by writers such as John Stuart Mill. Understanding this tradition, as modified by the other restraints of an 18th-century natural law theory of judicial decisionmaking, is important to understanding how Justice Kennedy decides cases. Part II of this article will discuss this natural law Enlightenment concept of liberty. Part III will show how that doctrine is reflected in the reasoning of opinions written by Justice Kennedy. Part IV will address other aspects of an 18th-century natural law theory of interpretation that limit full elaboration of this concept of liberty in Court decisions. Part V will provide a brief conclusion.

II: The Enlightenment Concept of Liberty

The 17th- to 18th-century Enlightenment natural law tradition included such writers as John Locke of the English Enlightenment; Adam Smith of the Scottish Enlightenment; and Montesquieu of the French Enlightenment. Under these approaches, rights derive from man and
man’s reason. As one author has noted, the Enlightenment tradition "exalted the autonomy of human reason, and exhorted the mind of man to look for a law of nature in the . . . state of nature." Another author has noted, the Enlightenment tradition of rational liberty is based on an "understanding of human nature as constituted by 'basic deliberative capacities' and by the potential for 'some measure of self-direction.' On that basis, liberalism pursues 'the preservation and enhancement of human capacities for understanding and reflective self-direction' as 'the core of the liberal political and moral vision.'"

Regarding political participation and democratic ideology, the Enlightenment concept of the social contract meant, as stated in 1788 by "the London Revolutionary Society, perhaps the key voice of English opposition ["Whig"] ideology, . . . (1) That all civil and political authority is derived from the people; (2) That the abuse of power justifies resistance; (3) That the right of private judgment, liberty of conscience, trial by jury, the freedom of the press, and the freedom of election ought ever to be held sacred and inviolable." The Enlightenment view of religion emphasized religious toleration. Enlightenment philosophy prized free speech very highly.

While many English, Scottish, and French Enlightenment writers contributed to the development of the Enlightenment tradition in the 17th and 18th century, John Locke had the


7 See Smith, supra note 4, at 92-119 (discussing liberalism and freedom of speech).
greatest influence on the framing and ratifying generation. As Professor Rogers Smith has noted, "Locke is crucial . . . because the political philosophy of liberalism is historically linked with a whole range of distinctive developments that are best encompassed in his writings." As Smith noted, "Four goals were central to Locke's original vision of liberalism: civil peace, material prosperity through economic growth, scientific progress, and rational liberty." 

Natural law also influenced the pre-Civil War period leading up to the framing and ratifying of the 13th and 14th Amendments. During the pre-Civil War period, the dominant mode of legal analysis is best characterized as reflecting natural law presuppositions. In this period, judges were sensitive to the consequences of adopting a particular rule, and resorted to works such as Adam Smith to determine the efficacy of various outcomes.

For example, as noted by Professor Morton Horwitz in THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, "During the last fifteen years of the eighteenth century, one can identify a gradual shift in the underlying assumptions about common law rules. For the first time, lawyers and judges can be found with some regularity to reason about the social consequences of particular legal rules." Horwitz added, "This increasing preoccupation with using law as an instrument of policy is everywhere apparent in the early years of the nineteenth century. Two decades earlier it would have been impossible to find an American judge ready to analyze a private law question by agreeing 'with Professor Smith, in his "Wealth of Nations", . . . that distributing the burthen of losses, among the greater number, to prevent the ruin of a few, or of an individual, is most conformable to the principles of insurance, and most conducive to the

8 Smith, supra note 4, at 15.

9 Id. at 18.

general prosperity of commerce."\textsuperscript{11} Professor Kermit Hall similarly stated in his book on American legal history, "The ethical yardstick employed by colonial courts was replaced by a new measure that asked judges to consider how legal rules encouraged economic growth, individual risk taking, and the accumulation of capital."\textsuperscript{12}

As legal historians have observed, this focus on changing the common law to promote economic growth differed from the focus of courts in the colonial period on stability in the law to promote the moral and religious notions of the community and to protect existing economic arrangements.\textsuperscript{13} Specifically, Professor William Nelson noted that the colonial period was a period of ethical unity and community based norms where consensus "was promoted by the fact that nearly all members of society shared common ethical values and imposed those values on the occasional individual who refused to abide by them voluntarily."\textsuperscript{14}

This change in focus is best conceived as a change from an ethical natural law to an economic natural law focus. As Dean Roscoe Pound stated in 1938, "In the nineteenth century, the stabilizing and conserving natural law takes on three forms, ethical, political and economic. The ethical form, in which moral precepts dictated by reason are the ideal, is the oldest, coming from the seventeenth century, where it connects with the theological natural law of the Middle Ages. It is replaced in early nineteenth-century America by the political form in which an ideal of 'the nature of American institutions' or the 'nature of free institutions' or the 'nature of free

\begin{footnotes}
\item[11] Id. at 3 (citations omitted).
\item[14] Nelson, supra note 13, at 3.
\end{footnotes}
government' is the starting point. Later, as the stabilizing side of natural law comes to be the one stressed chiefly, an economic ideal of a society ordered by the principles of the classical political economy prevails."\(^\text{15}\)

As has been noted, this change resulted in a number of alterations in traditional common law doctrine. For example, the property doctrine of “natural flow,” which barred riparian owners from interrupting the flow of water to others, was changed to a doctrine of “reasonable use,” which encouraged productive use of water resources. The tort doctrine of “strict liability” was changed to a concept of “negligence,” which freed up entrepreneurial activity by removing the threat of strict liability. In contract doctrine, there was a change from rules focused on “fair” prices to refusing to set aside contracts for inadequacy of consideration and the “widespread acceptance of the rule of caveat emptor.”\(^\text{16}\)

Despite this economic focus on productive activity, such an approach did not, and should not, support as moral a self-interested approach of unbridled capitalism. As Adam Smith stated in *The Theory of Moral Sentiments*,\(^\text{17}\) an individual ought to act like an “impartial spectator,” giving equal weight to others’ interests as well as one’s own. This is a version of the basic biblical principle of “love of neighbor as oneself.” Adam Smith stated:

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In the same manner, to the selfish and original passions of human nature, the loss or gain of a very small interest of our own, appears to be of vastly more importance... than the greatest concern of another with whom we have no particular connection... Before we can make any proper comparison of those opposite interests, we must change our position. We must view him, neither from our own place nor yet from his, but from the place and with the eyes of a third person who has no particular connection with either, and who judges impartially between us...

When the happiness or misery of others depends in any respect upon our conduct, we dare not, as self-love might suggest to us, prefer the interest of one to that of many. The man within immediately calls to us, that we value ourselves too much and other people too little, and that by doing so we render ourselves the proper object of contempt and indignation of our brethren.18

Immanuel Kant’s view that reason compels an individual “to act only in accordance with a principle that one could will to be a universal law” and for everyone “to treat others always as end-in-themselves, and not as a means to your ends”19 also rejects egotism and is consistent with Adam Smith’s concept of behavior according to the logic of an “impartial spectator.” Ronald Dworkin has noted that this general principle of “equal concern and respect” for others represents the best interpretation of the foundational moral principle of Western industrialized societies.20

In sum, the Enlightenment principle that reason requires giving individuals equal concern and respect, combined with the assertion that moral thought should be rational,

18 Smith, supra note 17, at 221, 223, cited in Kelso & Kelso, supra note 17, at 517-18.

19 See 1 Encyclopedia of Ethics 666 (Becker & Becker eds. 1992) (“This yields the first formulation of Kant’s categorical imperative, the Formula of Universal Law: ‘Act only on a maxim which you can at the same time will to be a universal law... This leads Kant to a new formulation of the categorical imperative: ‘Act always so that you treat humanity, in your own person or another, never merely as a means but also at the same time as an end in itself.’”), discussing Immanuel Kant, GROUNDWORK OF THE METAPHYSICS OF MORALS (1785); Immanuel Kant, CRITIQUE OF PURE REASON (1788)).

20 Ronald Dworkin, TAKING RIGHTS SERIOUSLY 272-73 (1977) (“Government must not only treat people with concern and respect, but with equal concern and respect.”).
supports as moral the foundational principle of most moral traditions, including religious traditions: the principle of love of neighbor as oneself, or equal concern and respect for others, or behave according to the logic of the impartial spectator, or, as it is sometimes phrased, “do unto others as you would have them do unto you.” Moral conclusions directly derivable from this principle are also rational. These include such widely-shared principles such as not taking innocent life, respecting other persons’ bodily integrity and personal property, and not lying to other people for one’s personal gain.

More generally, this view supports an understanding of liberty reflect in John Stuart Mill’s famous 19th-century book, On Liberty. As has been noted:

Under Mill’s still prominent “harm principle,” personal autonomy should be protected so long as it is not exercised in violation of the basic interests of others, for example, of their interests in personal security and property. Autonomy is not to be subordinated to the conventions of the majority. . . . Finally, Mill is a strong advocate of free speech. “[F]reedom of opinion, and freedom of the expression of opinion” is necessary “to the mental well-being of mankind (on which all their other well-being depends).”

21 See generally Mark 12:31 (“Thou shalt love thy neighbor as thyself.”); Issac Herzog, 1 THE MAIN INSTITUTIONS OF JEWISH LAW 386 (Sonsino Press 1936-39) (“[B]ring the law as much as possible into line with the highest ethical norms, already presided over the growth and development of Jewish law [which] commanded ‘Love thy neighbor as thyself’ and ‘Love the stranger as thyself.’ Leviticus xix, 19, 33-34.”), quoted in Amihai Radzyner, Between Scholar and Jurist: The Controversy over the Research of Jewish Law Using Comparative Methods at the Early Time in the Field, 23 J. L. & Rel. 189, 208 (2007-2008); Geoffrey R. Stone, The World of the Framers: A Christian Nation?, 36 UCLA L. Rev. 1, 13 (2008) (“For Jefferson, the fundamental principles of morality, which he believed were held in common in all religions, were captured by Jesus’ maxims, “Treat others as you would have them treat you” and “Love thy neighbor as thyself.””), quoting Kerry Walters, RATIONAL INFIDELS: THE AMERICAN DEISTS 181 (1992); Imam Feisal Abdul Rauf, What is Islamic Law, 57 Mercer L. Rev. 595, 599-600 (2006) (“Islamic Law, called Sharia, starts off from these two commandments” – “love the Lord thy God” and “love thy neighbor as thyself.”); R. Mary Hayden Lemmons, ain Tolerance, Society, and the First Amendment: Reconsiderations, 3 U. St. Thomas L.J. 75, 89 (2005) (“Hinduism: ‘One should never do that to another which one regards as injurious to one’s own self”; and Buddhism: ‘Hurt not others in ways that you yourself would find hurtful.’”).

In reaching such conclusions, Mill’s actual precepts track closely the principles of justice developed according to the logic of rational thought, but are justified on utilitarian grounds. It has been noted, “Mill argues in his famed utilitarian defense of the precepts of justice that the means to general utility include the recognition of individual rights because the protection of people’s sentiment of justice is socially expedient. In other words, people will be unhappy if justice does not prevail. . . . In order to promote happiness, individuals must have the right to choose what to believe and how to behave.” This is similar to the conclusion of noted philosopher R.M. Hare that Kant’s principle of “universalizability” is as consistent with an act utilitarian or rule utilitarian moral philosophy as it is with Kantian moral philosophy. Thus, whether justified on Enlightenment or utilitarian grounds, the same fundamental principle of rational liberty remains central to moral reasoning.

III. Justice Kennedy’s Decisions on Liberty

A. General Considerations

Consistent with the traditions of John Locke, Adam Smith, and John Stuart Mill, Justice Kennedy defines liberty very broadly, and views it as protected by a wide variety of means. Regarding its central core, he said in Boumediene v. Bush, “The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.” However, liberty extends far beyond physical restraint. In Planned Parenthood v. Casey, the Court

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23 Kuklin & Stempel, supra note 22, at 57.


reaffirmed that “our laws and traditions afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education.”

Explaining, Justice Kennedy wrote in the joint opinion with Justices O’Connor and Souter, “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”

Justice Kennedy cited and reaffirmed these ideas in his majority opinion in Lawrence v. Texas. Writing for a Court that invalidated a Texas statute which criminalized homosexual sodomy, he said, “Liberty protects the person from unwarranted government intrusion into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spacial bonds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”

Regarding a mechanism by which the concept of liberty may expand, Justice Kennedy noted that the Framers could not have foreseen the components of liberty in all of its manifold possibilities. However, “They knew times can blind us to certain truths and later generations can see that laws once thought necessary and

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27 Id. at 851.


29 Id. at 562.
proper in fact serve only to oppress. As the Constitution endures, persons in every
generation can invoke its principles in their own search for greater freedom.”

Justice Kennedy echoed these ideas in Parents Involved in Community Schools v.
Seattle School District No. 1. There he was concerned about the danger to individual
freedom when race is used in assigning students to school. He explained, “Under our
Constitution the individual, child or adult, can find his own identify, can define her own
persona, without state intervention that classifies on the basis of his race or the color of her
skin.”

Under this view, a natural law approach does not commit the judge to the view that
the concepts embedded in the Constitution have a static content that, when applied to
concrete specific problems, have an unchanging meaning. That would not have been the
understanding that any drafter would have had under an Enlightenment perspective. As
Professor David Richards has noted, "No great political theory, including Locke's, is the last
word on its own best interpretation, and critical advances in political theory may enable us
better to understand and interpret the permanent truths implicit in the theory and to
distinguish these from its lapsing untruths.”

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30 Id. at 579.


32 Id. at 797 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy expressed similar concerns when, dissenting in Grutter v. Bollinger, 539 U.S. 306, 387 (2003) (Kennedy, J., dissenting), he found that strict scrutiny was not satisfied when a law school’s compelling interest in a diverse student body was pursued by means which did not safeguard individual assessment through the entire process.

Justice Souter addressed this point regarding an evolving understanding of principles during his confirmation hearing in 1989. He noted, "Principles don't change but our perceptions of the world around us and the need for those principles do." Justice Kennedy reflected a similar point in 2003 in *Lawrence v. Texas*, which held unconstitutional laws criminalizing consensual sodomy. He noted for the Court, “Had those who drew and ratified the Due Process Clause of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”

In short, a person who wishes, consistent with a natural law tradition to apply consistently a general concept in which the individual believes, may have to adjust one or more specific views which currently are not consistent with that general concept. Through this process, a dynamic is created whereby over time more of an individual's specific views will be a reflection of reasoned elaboration of general moral concepts applied to current social realities, rather than specific views merely being the product of the individual's past experiences, unthinking adherence to tradition, idiosyncratic preferences, or prejudice. Under this view, while general concepts embedded in the Constitution do not change, and thus the “living” or “evolving” Constitution is not based even in part on a mere reflection of

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contemporary social policies, our understanding of what those general concepts mean when applied to specific fact situations can change over time. This is similar to the view that the principles in foundational religious documents, like the Bible, do not change, but that our understanding of the content of those principles can change, such as the difference between traditional Christian doctrine, which supported slavery and anti-Semitism, and viewed the earth as the center of the universe, and modern Christian doctrine which reject these traditional views.

Further, from a natural law interpretation perspective, the framers and ratifiers would wish later generations to give that concept the more enlightened and progressive reasoning, since they were not putting into the Constitution their own fixed, subjective, specific views about some matter, but rather were placing into the Constitution broad natural law principles whose content they believed was independent of their specific views, and which would better be discovered over time through the application of reason. After all, the framers were not “positivists,” who believed, consistent with “positivism,” that their task consisted entirely of placing their fixed preferences into the Constitution. Instead, as responsible believers in natural law, the framers would have been somewhat humble concerning whether their current reasoning at the time of ratification fully reflected a complete understanding of the natural law principles in which they believed.36

As discussed in Part II, an evolved understanding of “liberty” and “equality” supports the foundational principle of “equal concern and respect” for all individuals.

alternatively phrased as “love of neighbor as thyself.” As an example of how an evolved understanding of a natural law concept can influence modern constitutional law doctrine, Justice Ruth Bader Ginsburg noted during her confirmation hearing that the general concept of equality in the Declaration of Independence and the Equal Protection Clause of the 14th Amendment is broad enough to embody a principle of equal rights for women, despite the fact that the specific views of Thomas Jefferson and others in the 18th century, and many framers and ratifiers of the 14th Amendment in 19th century, were not ready for women to be equal participants in public life. During her confirmation hearing, Justice Ginsburg quoted Jefferson that "[t]he appointment of women to public office is an innovation for which the public is not prepared, nor am I." Nevertheless, as Justice Ginsburg noted, she presumed that if Jefferson were alive today he would have a different specific view on the role of women in public life based on the general concept of equality in which Jefferson believed – each individual's equal and unalienable right to "life, liberty, and the pursuit of happiness."³⁷

Professor Jefferson Powell has noted that this "progressive" mode of reasoning was shared by James Madison on the Republican side of early American politics, and by Alexander Hamilton and Chief Justice John Marshall on the Federalist side. Although some on the Republican side, including Jefferson, adopted arguments related to a plain meaning approach that viewed "constitutional propositions [as] deductions from static principles" from which "no argument from subsequent precedent, practice, or experience could change,"³⁸ that approach to interpretation was rejected by early and continuous Supreme

³⁸ Powell, supra note 4, at 92, 95. Such an approach is similar to the static Constitution, plain meaning approach of Justice Scalia in A MATTER OF INTERPRETATION 37-41, 44-47 (1997).
Court practice. Instead, the common-law methodology of Madison, Hamilton, and Marshall won, based on a Constitution “adapted to the various crises of human affairs.”

From a natural law perspective, the critical purpose of a Constitution is not to be “anti-evolutionary,” but rather to be “anti-majoritarian.” The point of natural law provisions in a Constitution is to remove certain decisions from the majoritarian democratic process based on the natural rights that individuals have to be free from majoritarian prejudices. As Professor Chemerinsky has noted:

[T]he framers openly and explicitly distrusted majority rule; virtually every government institution they created had strong anti-majoritarian features. Even more importantly, the Constitution exists primarily to shield some matters from easy change by political majorities. The body of the Constitution reflects a commitment to separation of powers and individual liberties (for example, no ex post facto laws or bills of attainder, no state impairment of the obligation of contracts, no congressional suspension of the writ of habeas corpus except in times of insurrection). Furthermore, as Justice Jackson eloquently stated:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote: they depend on the outcome of no elections.

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39 See generally Powell, supra note 4, at 92-100, 117; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 45 (1819) (“This provision is made in a constitution, intended to endure to ages to come, and consequently, to be adapted to the various crises of human affairs.”).

From the perspective of natural law, the protection of individual rights to liberty and equality is the paramount concern. A pluralistic democratic society is viewed not as an end-in-itself, but rather as the best means by which to ensure that society protects and advances the set of universal natural principles of justice. As phrased in the Declaration of Independence, “We hold these truths to be self-evident; that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness” and that “to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.”

From such a perspective, it would be counterproductive to adopt a Constitution based upon a “static” model of interpretation, since that model would allow for moral progress only when the democratic majority decided to adopt the more enlightened interpretation of the natural law principle. Yet, the whole point of enacting that natural law constitutional provision was to remove that decision from democratic decisionmaking.

For example, when judges, post-1954, have adopted more enlightened interpretations of equal protection and due process to create advances in race relation cases, gender discrimination cases, and cases involving sexual orientation, they have acted consistent with a natural law understanding of those concepts. For the Court to have sat on the sidelines and hoped for the legislative and executive processes alone to deal with those matters would have been a betrayal of what those natural law principles were about. For the most part, the Court did sit on the sidelines on those issues between 1873-1954, with little moral progress made on those issues during that time. The major exception to this lack of progress was women being granted the

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41 For the complete text of the Declaration of Independence available online, see, e.g., http://www.archives.gov/exhibits/charters/declaration.html.
right to vote in 1920, which was the product of an enormous social movement, and not equaled with respect to the Equal Rights Amendment.  

Admittedly, from the “positivist” perspective, such a view of judicial review raises clear “counter-majoritarian” difficulties.  

On the other hand, a natural law methodology consists of engaging in reasoned elaboration of the moral and political concepts placed into the Constitution by the framers and ratifiers, while balancing that elaboration against the demands of constitutional text, context, history, legislative and executive practice, precedents, and prudential considerations. Discussion of specific areas regarding Justice Kennedy’s approach to liberty appears below in Section B of Part III. Discussion of balancing that elaboration against the demands of text, context, history, legislative and executive practice, precedents, and prudential considerations appears in Part IV.

**B. Specific Areas of Decisionmaking**

Four specific areas help make clear the contours of Justice Kennedy’s commitment to liberty: freedom of speech, individual autonomy, individual liberty versus government liberty, and international views on liberty.

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42 On the race, gender, and sexual orientation cases generally during the 20th century, see William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich. L. Rev. 2062 (2002).


1. Freedom of Speech

Justice Kennedy has been a vigorous advocate for the freedom of speech. For example, in 1991, in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, the Court adopted a strict scrutiny approach to content-based regulations of speech. As the Court stated in *Simon & Schuster*, to justify a “content-based” regulation of speech “the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.” Concurring in the case, Justice Kennedy noted that this adoption of the Equal Protection strict scrutiny approach in a First Amendment case was not required by prior precedents, and that while “the compelling interest inquiry has found its way into our First Amendment jurisprudence of late . . . the Court appears to have adopted this formulation in First Amendment cases by accident rather than as the result of a considered judgment.” In contrast, Justice Kennedy preferred Justice Black’s absolutist approach, which would prevent the state from any content-based regulation of fully-protected speech, without regard to a compelling governmental interest analysis. While a majority of the Court has consistently rejected Justice Kennedy’s views, Justice Kennedy has indicated he adheres to his more absolutist approach, as reflected in the 2002 case of *Republican Party of Minnesota v. White*.


46 *Id.* at 117-18.

47 *Id.* at 124-15 (Kennedy, J., concurring).

48 *Id.* at 125.

49 536 U.S. 765, 774-75 (2002); *id.* at 793 (Kennedy, J., concurring) (“I adhere to my view, however, that content-based speech restrictions that do not fall within any traditional exception should be invalidated without any inquiry into narrow tailoring or compelling governmental interests.”).
Even where Justice Kennedy has acquiesced in the view that content-based regulations trigger strict scrutiny, he has been a forceful advocate for applying strict scrutiny vigorously. For example, in *Texas v. Johnson*, a 5-4 Court held that a state flag desecration statute was invalid as applied to defendant, who had burned a flag as part of a political protest. Justice Kennedy, concurring, made clear that the decision was quite difficult for him, but that free speech should be protected. He said, “The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. . . . Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.”

Justice Kennedy has also been a forceful advocate for free speech in the context of the campaign finance cases. For example, in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*. Justice Kennedy joined Justices Scalia and Thomas to conclude in Part I of the opinion that a campaign finance statute’s limits on coordinated expenditures between a candidate and a state political party should be tested by strict scrutiny, and in Part II that even under the Court’s traditional less-than-strict-scrutiny *Buckley* analysis the regulations were unconstitutional.

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51. *Id.* at 420-21 (Kennedy, J., concurring).

This commitment to free speech in the context of campaign finance was again on display in the 2010 case of Citizens United v. Federal Communications Commission.\textsuperscript{53} In Citizens United, a 5-4 Court held that the First Amendment was violated by a law that prohibited corporations and unions from using their general treasury funds to make independent expenditures for electioneering communications or for speech expressly advocating the election or defeat of a candidate. Writing for the Court, Justice Kennedy said that the Government may regulate corporate political speech through disclaimer and disclosure requirements, but may not suppress that speech altogether.\textsuperscript{54} Justice Kennedy noted that the “right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. . . . [By] taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect to the speaker’s voice. . . . The First Amendment protects speech and speaker, and the ideas that flow from each.”\textsuperscript{55}

For content-neutral regulations of speech, the Court adopts an intermediate standard of review. As Justice Kennedy noted in Ward v. Rock Against Racism, “Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for

\begin{itemize}
\item \textsuperscript{53} 130 S. Ct. 876 (2010).
\item \textsuperscript{54} \textit{Id.} at 886.
\item \textsuperscript{55} \textit{Id.} at 898-99.
\end{itemize}
communication of the information." To apply such a standard, the government must show its regulation is content-neutral, and justified either as a reasonable time, place or manner regulation, such as regulating to control noise pollution and protect residential privacy in *Ward*, or on grounds of suppressing secondary effects, like combating increased prostitution and drug use around adult motion picture theaters or bookstores in *Renton v. Playtime Theatres, Inc.*, and *City of Los Angeles v. Alameda Books, Inc.*

Even then, under intermediate review, the quantity and accessibility of speech must be left substantially intact. As Justice Kennedy noted in *Ward v. Rock Against Racism*, a content-neutral regulation of speech cannot burden substantially more speech than necessary to further the interest, nor can it place a substantial burden on speech that does not serve to advance its goals. In *Alameda Books*, Justice Kennedy noted that a full First Amendment analysis must consider both benefits and burdens on the speech. As Justice Kennedy observed, “[T]he necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech.”

In a non-public forum, content-based, subject-matter regulations of speech, or content-neutral regulations of speech, are given only minimum rational review, unless viewpoint discrimination is involved. As indicated in *Boos v. Barry*, viewpoint discrimination always

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60 *Alameda Books*, 535 U.S. at 450 (Kennedy, J., concurring).

triggers strict scrutiny review. Justice Kennedy has been willing to find viewpoint discrimination in close cases, and thus provide a heightened level of free speech protection, sometimes disagreeing with the liberal block of 4 Justices, and other times disagreeing with the conservative block of 4 Justices.

For example, in *Rosenberger v. Rector and Visitors of the University of Virginia*, 62 the university was paying the printing costs for a variety of publications by certified student organizations, but on Establishment Clause grounds refused to pay for a student paper that promoted a particular belief in or about a deity or an ultimate reality. Writing for a 5-4 Court, Justice Kennedy said that this was viewpoint discrimination, since the university did not exclude religion as a subject matter, but selected for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Justice Kennedy pointed out that the university was not subsidizing a message it favors, which would trigger only minimum rationality view, as occurred in *Rust v Sullivan*, 63 but instead was spending funds to encourage a diversity of views from private speakers. 64 Underscoring this was a close case of viewpoint discrimination, Justice Souter, dissenting with Justices Stevens, Ginsburg, and Breyer, said that there was no viewpoint discrimination because the university had simply denied funding for speech that primarily promotes or manifests any view on the merits of religion. Thus, it denies funding for the entire subject matter of religious or non-religious apologetics. 65


63 500 U.S. 173, 193 (1991) (Government may properly prohibit programs receiving family planning funds from engaging in abortion counseling).

64 *Rosenberger*, 515 U.S. at 828-37.

65 *Id.* at 863-64 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).
A result similarly protective of free speech emerged in *Legal Services Corp. v. Velazquez*.66 There, Justice Kennedy wrote for a majority comprised of himself and Justices Stevens, Souter, Ginsburg, and Breyer. The Court held that the First Amendment was violated by a restriction in the Legal Services Corporation Act that barred lawyers funded through that Act from engaging in an effort to amend or otherwise challenge existing welfare law in effect on the date of the initiation of the representation. Justice Kennedy said that the government can make viewpoint-based funding decisions when the government itself is the speaker or, as in *Rust*, where the government uses private speakers to transmit information pertaining to government programs. However, an LSC-funded attorney speaks on behalf of the client, not the government. Further, the restriction distorts the legal system by altering the traditional role of attorneys and, thus, is inconsistent with separation-of-powers principles. The Court must be vigilant, he said, when Congress imposes rules and conditions which insulate its laws from legitimate judicial challenge.67 Again, indicating this was a close case of viewpoint discrimination, Justice Scalia dissented, joined by Chief Justice Rehnquist, and Justices O’Connor and Thomas. Justice Scalia wrote that *Rust* was controlling. The discrimination on the basis of content should not trigger strict scrutiny because a decision not to subsidize the exercise of a fundamental right does not infringe that right. Nor does the law discriminate on the basis of viewpoint since the government funds neither challenges to, nor defenses of, existing welfare law. The LSC subsidy, said Justice Scalia, neither prevents anyone from speaking nor coerces anyone to change speech.68

67 *Id.* at 540-49.
68 *Id.* at 552-59 (Scalia, J., joined by Rehnquist, C.J., and O’Connor & Thomas, JJ, dissenting).
Absent viewpoint discrimination, in a non-public forum, content-based, subject-matter regulations of speech, or content-neutral regulations of speech, are given only minimum rational review.\textsuperscript{69} In determining whether a forum is a public forum or non-public forum, Justice Kennedy has sided with Justices willing to be more expansive in determining if a site is a public forum. A conclusion the site is a public forum leads the Court to apply the public forum standards, which are intermediate scrutiny for content-neutral regulations and strict scrutiny for content-based regulations.

For example, in \textit{International Society for Krishna Consciousness v. Lee},\textsuperscript{70} Chief Justice Rehnquist wrote for a majority that a public airport terminal was not a public forum and reasonably could ban the repetitive solicitation of money within its terminals. With respect to the nature of the forum, the Chief Justice’s opinion was joined unreservedly by Justices White, Scalia, and Thomas, and, in a concurrence, by Justice O’Connor. In his opinion, Chief Justice Rehnquist said that the decision to create a public forum is made by intentionally opening a non-traditional forum for public discourse. The tradition of airport activity does not demonstrate that airports have historically been opened for speech activity, and the operators have frequently objected in litigation to such activity. It is not persuasive that speech activity has occurred at various "transportation nodes," such as rail stations, because they traditionally have had private ownership and here the relevant unit is the airport, not "nodes" generally. Airports are commercial enterprises, whose management considers their purpose to be the facilitation of passenger air travel. Therefore, only a reasonableness standard need be applied.\textsuperscript{71} Viewing the

\begin{itemize}
\item\textsuperscript{70} 505 U.S. 672 (1992) (Rehnquist, J., opinion for the Court in part).
\item\textsuperscript{71} \textit{Id.} at 677-83.
\end{itemize}
case against a background of substantial congestion, Chief Justice Rehnquist, with Justices White, Scalia, and Thomas, upheld both a ban on solicitation and a ban on literature distribution, including leafleting. Rehnquist noted that allowing solicitation on outside sidewalks, as provided by the airport managers, gives sufficient access to an area universally traveled.\(^\text{72}\)

In contrast, Justice Kennedy, joined by Justices Blackmun, Stevens, and Souter, said that an airport is a public forum. Focusing more on the objective characteristics of the property, Justice Kennedy concluded that public forum status should be given to property if its physical characteristics and actual public uses permitted by the government indicate that expressive activity would be appropriate and compatible with those uses. Under this test, airport terminals are a public forum because their public spaces are broad, they have public thoroughfares full of people, and they are lined with stores and other commercial activities. And there had been no showing that any real impediments could not be cured with reasonable time, place or manner regulations.\(^\text{73}\) Given the current membership of the Court, this approach would likely be adopted by a majority of Justices, composed of Justices Stevens, Kennedy, Ginsburg, Breyer, and Sotomayor.

Applying intermediate scrutiny appropriate for content-neutral regulations in a public forum, Justice Kennedy then concluded in \textit{Lee} that the ban on solicitation for the receipt of money was valid as a time, place or manner regulation. This behavior creates a risk of fraud and duress, and there were ample alternatives because the solicitor could give a pre-addressed envelope. However, the ban on distributing or selling literature was invalid. The claim for duress was weak and there was no evidence of coercive conduct. There was almost no evidence

\(^{\text{72}}\) \textit{Id.} at 683-85.

\(^{\text{73}}\) \textit{Id.} at 693 (Kennedy, J., joined in Part I by Blackmun, Stevens & Souter, JJ., concurring in the judgment).
of fraud. Ample alternative channels for solicitation did not exist because the distribution of pre-
addressed envelopes was unlikely to be much of an alternative.74

Reflecting more the “objective” characteristics of the property approach of the Kennedy concurrence in *Lee*, lower federal courts since *Lee* have held that a private sidewalk encircling a privately owned sports arena complex, which appears like any public sidewalk and is used as a public thoroughfare, is a public forum, and that a mass transit agency’s acceptance of advertisements on a wide range of topics under contracts for display in its stations and vehicles, for the purpose of raising revenue, made such areas designated public fora, triggering public forum First Amendment review.75

2. Individual Autonomy

One area of significant litigation regarding individual autonomy has been the right of privacy cases regarding rights to reproductive freedom. In these cases, Justice Kennedy has typically voted on the side of individual autonomy rights. For example, in *Planned Parenthood v. Casey*,76 Justice Kennedy joined with Justices O’Connor and Souter to uphold the core rights in this area. In their joint opinion in *Casey*, these three Justices stated:

74 Id. at 703-04 (Kennedy, J., concurring in the judgment). Justice Souter, joined by Justices Stevens and Blackmun, concluded that both bans were invalid as not being substantially related to advancing a substantial governmental interest. Id. at 709-10 (Souter, J., joined by Stevens & Blackmun, JJ., concurring in the judgment in part and dissenting in part).


Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. . . . At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.77

Another prominent area of constitutional cases regarding protection of individual autonomy has involved sexual orientation. The foundational case in this area is Romer v. Evans.78 There, an opinion for the Court by Justice Kennedy invalidated Amendment 2 of the Colorado Constitution. That Amendment had repealed all state laws which protected homosexuals from discrimination, and prohibited such measures in the future except via an amendment to the state constitution. The state sought to justify the Amendment as respecting other citizens’ freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Justice Kennedy replied that the breadth of Amendment 2 was so far removed from those particular justifications that they could not be credited, and the law seemed merely to make homosexuals unequal to everyone else with respect to seeking aid from the government. Thus, it was the product of an illegitimate animus toward persons based upon sexual orientation. This, he said, Colorado cannot do.79

In Lawrence v. Texas,80 the Court invalidated a Texas statute that criminalized homosexual sodomy. For the Court, Justice Kennedy said that the law furthered no legitimate state interest that could justify its intrusion into the personal and private life of the individual.

77 Id. at 851 (joint opinion of O’Connor, Kennedy & Souter, JJ.).
79 Id. at 627-35.
Justice Kennedy wrote that a reasoned elaboration of the Court’s precedents “show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. . . . When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and private spheres. . . . [T]his demeans the lives of homosexual persons.”\(^{81}\)

Consistent with the “harm principle” as elaborated by John Stuart Mill,\(^{82}\) Justice Kennedy noted that this case did not involve activity which might harm others, and thus might be a proper subject of government regulation. Rather, it was the product of consensual conduct between adults. Justice Kennedy stated, “The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. . . . Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”\(^{83}\)

\(^{81}\) Id. at 572, 575.

\(^{82}\) See supra text accompanying note 22.

\(^{83}\) 539 U.S. at 578.
3. Government Liberty versus Individual Liberty

In several cases, Justice Kennedy has had to balance an individual liberty right with the right of the government to advance its own liberty interest. In these opinions, Justice Kennedy did not make any broad, general pronouncements on the nature of liberty, but did attempt to insure that liberty was adequately protected by what the Court was doing and saying.

For example, in Morse v. Frederick, the majority held that a school could suspend a student for displaying a banner (“BONG HITS 4 JESUS”) during a school event which reasonably could be interpreted as promoting illegal drug use. Justice Kennedy joined a concurring opinion by Justice Alito to emphasize that they joined the opinion of the Court only on the assumption that it regulated only speech connected to a school-sponsored curricular event, and thus appropriately regulated by the government. For Kennedy and Alito, the majority opinion provided no support for applying a reasonableness analysis to any restriction on student-generated speech outside the school curriculum, such as speech commenting on political or social issues, including speech on issues such as the wisdom of the war on drugs or to legalizing marijuana for medicinal use. Such student generated speech would normally be reviewed under the intermediate standard of scrutiny applied in Tinker v. Des Moines Independent Community School District.

Similarly, Justice Kennedy had to balance an individual’s free speech right with government liberty interests in Garcetti v. Caballo. In Garcetti, Justice Kennedy authored the majority opinion which held that “when public employees make statements pursuant to their

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official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."  

This protects the government’s liberty right to make its own employment-related decisions. However, Justice Kennedy made clear that statements by employees who are acting as public citizens, whether on the job or not, are to be given First Amendment protection.

Another similar opinion occurred under a Takings Clause analysis. The taking of private property by the government is an interference with the owner’s liberty to do what he or she wants to do with regard to the property. However, the Takings Clause does provide the government with the liberty right to take such property for public use, as long as just compensation is paid. In *Kelo v. City of New London*, a majority of the Court held that the government could take property for “public use” and that this included taking for a “public purpose,” such as encouraging private development of an urban neighborhood. Justice Kennedy’s concurring opinion emphasized that a presumption of invalidity should be applied if there was a clear showing that the government’s action was intended to favor a particular private party, with only incidental or pretextual public benefit, and thus not for a public use, but that in the ordinary case the government’s assertion of a public use, and thus a liberty right to take property, would be protected.

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87 *Id.* at 421.

88 *Id.*


90 *Id.* at 480-84.

91 *Id.* at 490-93 (Kennedy, J., concurring).
In other cases, Kennedy has supported the government action in the case before the court, but provided the individual with some possibility of relief against the government in other related factual settings. For example, in *Gonzales v. Carhart*, Justice Kennedy upheld the power of Congress to enact the Partial-Birth Abortion Act of 2003, even though it did not contain an exception for the health of a pregnant women short of a life-threatening condition, for which an exception was provided. Justice Kennedy said that there was doubt as to whether the procedure ever needed to be performed because of a non-life-threatening health condition, and he deferred to Congress’ judgment on that matter. But he carefully delineated how much liberty remained. He said that he assumed that before viability a State “may not prohibit any woman from making the ultimate decision to terminate her pregnancy,” and that a state during this time may not impose an undue burden, which exists “if a regulation’s ‘purpose or effect is to place a substantial obstacle in the path of a woman’” seeking an abortion. Further, he noted that if a woman could make a showing that in her case the statutory ban would be substantial obstacle to her obtaining an abortion, she could get relief.

A similar case granting the individual some possibility of relief occurred in *Palazzolo v. Rhode Island*. There, the Court, per Justice Kennedy, protected the freedom of property owners by holding that a taking claim is not automatically barred by the fact that the owner acquired the property after the restrictive regulation was enacted. On the facts of the case,

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93 *Id.* at 161-67.
94 *Id.* at 146, citing *Casey*, 505 U.S. at 878-79.
95 *Id.* at 167-68.
however, there was no automatic taking by a restrictive property use regulation because a portion of the property retained some value, and thus the taking issue had to be resolved under the multi-factored analysis of Penn Central Transportation Co. v. New York City.97

Where the government is not advancing legitimate interests, then naturally the individual liberty’s interest will prevail. For example, regarding limitations on the liberty of engaging in interstate business, Justice Kennedy wrote for a 6-3 Court in C & A Carbone v. Town of Clarkstown98 that a town ordinance was invalid which required that all nonhazardous solid waste be sent to a town-operated “transfer station” for processing. Justice Kennedy said that the law discriminated against out-of-state businesses and so there was no need for applying the Pike v. Bruce Church, Inc. balancing test in striking down the ordinance.99

Further, when the government attempts to usurp the Court’s role in determining the extent of individual liberties, Justice Kennedy will be moved to act. For example, in City of Boerne v. Flores,100 Justice Kennedy held on grounds of separation of powers and federalism that Congress could not override the Court’s determination of what rights exist under the Free Exercise Clause of the First Amendment. The background of Flores was the earlier Supreme Court case of Employment Division v. Smith,101 where the Court had held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling

97 Id. at 632, citing Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (in Takings Clause cases courts should consider the economic impact of a regulation, interference with reasonable investment-backed expectations, and the character of the government action).
government interest. To overrule *Smith*, Congress passed the Religious Freedom Restoration Act of 1993, which provided that laws which placed a substantial burden on religious practices could be upheld only if they served a compelling state interest and were narrowly tailored to achieve that end.\(^{102}\)

Even though this was a boost to religious liberty, Justice Kennedy wrote for a 6-3 Court in *City of Boerne* that the Act must be invalidated as an attempt to exercise power under § 5 of the Fourteenth Amendment by enacting a remedy which was not congruent and proportional to any pattern of state violations of the Amendment.\(^{103}\) Justice Kennedy explained that to hold otherwise would violate the separation of powers, since Congress would in effect be enacting substantive legislation at odds with the Court’s interpretation of the Fourteenth Amendment.\(^{104}\) Congress was also considerably intruding into the state’s traditional prerogatives and general authority to regulate for the health and welfare of their citizens, thus intruding on the federal balance enshrined in the doctrine of federalism.\(^{105}\) In the interest of federalism and the separation of powers, the opinion trimmed the power of Congress to protect religion or other forms of freedom, but it did not limit the power of the Court to protect religion when it finds that appropriate.\(^{106}\)


\(^{103}\) *Boerne*, 521 U.S. at 524-27.

\(^{104}\) *Id.* at 529, 534-35.

\(^{105}\) *Id.* at 533-34.

\(^{106}\) *Id.* at 535-36.
4. International Law Focus on Liberty

For Justice Kennedy, and other Justices operating out of an Enlightenment natural law tradition, there is an additional source for inspiration that may contain the seeds of a further enlargement in views on liberty: international law and legal developments in other nations. Natural law Justices should be willing to consider social practice from other countries, not for its social policy value, but to the extent that practice helps illuminate a reasoned elaboration of a universal natural law concept placed into the Constitution, something judges did during the original natural law era. Since many of the framers and ratifiers believed in natural law, many of the individual rights in the Constitution were likely intended to have such a universal natural law base. Naturally, international sources that can best shed light on that natural law concept would be the ones proper to use, such as European decisions grounded upon an Enlightenment understanding of basic human rights and human dignity.

For example, in Lawrence v. Texas, Justice Kennedy drew on international developments as one factor in determining that there is an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. In reaching that conclusion, Justice Kennedy relied in part upon broader arguments of social practice, including the “values we share with a wider civilization,” and

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107 See generally David Fontana, Refined Comparativism in Constitutional Law, 49 UCLA L. Rev. 539 UCLA L. Rev. 539, 575-83 (2001) (discussing judicial practice from 1789 through the Civil War); Sarah H. Cleveland, Our International Constitution, 31 Yale J. Int’l L. 1 (2006) (discussing cases where the Constitution refers to international law or international law is used as a background principle to identify the scope of the Constitution, the powers of the national government, delineate structural relationships within the federal system, or individual rights cases).

opinions of “the European Court of Human Rights,” as well as noting that by 2003 the legislative practice in the United States had changed, with only 9 states banning sodomy generally, and 4 states, including Texas, banning only homosexual sodomy.

In *Roper v. Simmons*, Justice Kennedy wrote for a 5-4 Court that it was cruel and unusual punishment to execute a person who was under 18 at the time of the crime. In doing so, Justice Kennedy spoke of an emerging consensus among the American states, but also that on the international scene the United States now stood alone in allowing such punishment, and was the only nation other than Somalia not to join the U.N. Convention on Rights of the Child.

As noted in Part IIIA, under the Enlightenment view of natural law, the protection of individual rights to liberty and equality are paramount, and a pluralistic democratic society is viewed not as an end-in-itself, but rather as the best means by which to ensure that society protects and advances the fundamental principle of equal concern and respect for all individuals. Courts that intervene to provide such protection of these inalienable rights against majoritarian will are thus advancing the natural law agenda.

For example, there is an emergent concern with gender equality in constitutional courts around the world. These decisions are based on the ideal of “equal concern and respect,” and

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109 Id. at 576.
110 Id. at 573.
112 Id. at 564-67.
113 Id. at 575-78.
114 See supra text accompanying note 41.
thus the fact that women deserve equal rights and liberties with men. This principle is reflected in many constitutional courts decisions.¹¹⁵

The principle of equal concern and respect also supports respect for human dignity and individual autonomy – giving others equal respect for their views, as long as they give equal respect to yours. This basic principle is reflected in decisions by many constitutional courts around the world. Regarding the nature of adjudication in these countries, Professor Thomas Gray has noted:

Modern rights typically are phrased in terms of broad moral concepts – for example, the right of human dignity was made the central organizing value in the German Constitution, and the prestige of that constitution, and of the German Constitutional Court in implementing it, have made that "dignity clause" particularly influential for other constitutional regimes around the world. . . .

[Further] is a cluster of phenomena usefully grouped under the label "judicial globalization." In Europe, the treaties establishing the European Union, and the European Convention on Human Rights agreed to by members of the Council of Europe, have taken on higher-law status within the domestic law of European states, and the European Court of Justice and the European Court for Human Rights have increasingly exercised active judicial review powers over trade and human rights law respectively. . . . Judges increasingly meet with each other across national lines to discuss their work, and this creates more avenues for transmitting judicial techniques and doctrines that have proved successful and prestigious, for building judicial esprit de corps, and encouraging newer or less secure constitutional judiciaries to imitate the confident exercise of sweeping powers of the most admired and best-established ones.¹¹⁶

Under this phrasing, there should be toleration for other individuals as long as they are tolerant, but no toleration of other individuals (or groups) that are intolerant and do not give other individuals equal concern and respect. This underlays the concern with not allowing the

¹¹⁵ See, e.g., CONSTITUTING EQUALITY: COMPARATIVE CONSTITUTIONAL LAW AND GENDER EQUALITY (Susan H. Williams, ed.) (Cambridge Univ. Press 2008); Helen Irving, GENDER AND THE CONSTITUTION: EQUITY AND AGENCY IN COMPARATIVE CONSTITUTIONAL DESIGN (Cambridge Univ. Press 2008); See generally Annotated Legal Bibliography on Gender, 15 Cardozo J.L. & Gender 383 (2009).

principle of toleration and respect for others to support blind deference to any multicultural tradition, even if that tradition denies certain individuals in that group, or subgroups within that group, equal concern and respect.\textsuperscript{117}

Regarding review of government administrative and criminal enforcement action, equal concern and respect requires not punishing or regulating the individual more than necessary. Thus, in the language of the Lord High Executioner in Gilbert and Sullivan's The Mikado, "My object all sublime, I shall achieve in time, to make the punishment fit the crime, the punishment fit the crime."\textsuperscript{118} This principle of proportionality of punishment applies not only under United States Supreme Court doctrine regarding criminal punishment, a view supported by Justice Kennedy, but in the world at large as well.\textsuperscript{119}

This principle of proportionality applies not only to criminal punishment, but to other kinds of review of executive action. Disproportionate regulation is unjust under this view because it does not respect the rights of individuals to equal concern and respect when balanced against the government's concerns supporting the regulation. The notion of proportionality to


\textsuperscript{119} See Harmelin v. Michigan, 501 U.S. 957, 997-1001 (1991) (Kennedy, J., joined by O’Connor & Souter, JJ., concurring in part and concurring in the judgment) (Eighth Amendment Cruel and Unusual Punishment Clause prohibits punishments which are “grossly disproportionate” to the crime); Alec Stone Sweet & Jud Mathews, \textit{Proportionality Balancing and Global Constitutionalism}, 47 Colum. J. Transnat’l L. 72, 75 (2008) (“In criminal law, the severity of the punishment is expected to be proportionate to the seriousness of the crime; in classic international law, proportionality is found in the law of reprisal and the use of force, and so on.”).
measure the constitutionality of government action is an emerging concept in many international contexts.\(^{120}\)

**IV. Limits on Liberty By A Natural Law Theory of Decisionmaking**

Although Justice Kennedy gives liberty great weight in his pantheon of constitutional principles, he does not regard it as an absolute right. True, there is a presumption of invalidity when strict scrutiny is used. However, he and the Court give government interests considerable weight, and also give deference to legislative and executive judgments when the standard of review is rational basis – as it is when the alleged right is not considered fundamental or a classification does not involve a suspect or quasi-suspect class. Further, an explication of liberty can be limited when considered alongside the other standard sources of constitutional interpretation for Justices in an Enlightenment natural law tradition: the demands of constitutional text, context, history, legislative and executive practice, precedents, and prudential considerations.

The natural law approach toward purpose, history, practice, and precedent was summed up by James Madison discussing constitutional interpretation. It has been noted, "'[A]mong the obvious and just guides to [interpreting] the Constitutio[n],' Madison listed: '1. The evils and defects for which the Constitution was called for & introduced. 2. The comments prevailing at the time it was adopted. 3. The early, deliberate, and continued practice under the Constitution, as preferable to constructions adapted on the spur of occasions, and subject to the vicissitudes of party or personal ascendancies.'"\(^{121}\)


A more complete elaboration of this style of interpretation appears in Justice Joseph Story’s *Commentaries on the Constitution of the United States.* Building on Madison's insights, who had nominated him to the Supreme Court, Justice Story discussed the natural law approach toward separation of powers and federalism, embracing sharing of powers, checks and balances, and the need for a strong federal government. He also indicated an abiding faith in the Anglo-American common law system and its preference for clearly defined legal tests, coherence and consistency in legal categories, and deciding cases on narrower grounds where possible. His faith in the common law also meant he was suspicious of the 19th-century legislative codification movement. It has been noted, "Among the American lawyers and judges of [the early 19th century], Justice Story stands out as possibly the most learned and influential defender of the natural law tradition. To Story it was imperative that American lawyers understand natural law in interpreting and applying the principles of the Constitution and the common law. Being 'a philosophy of morals', natural law was to Story the substratum of the legal system, resting 'at the foundation of all other laws.'"

These sources of interpretation can be organized under two broad headings: contemporaneous sources of meaning and subsequent considerations. Contemporaneous sources are those sources that existed at the time a constitutional provision was ratified. These include the text of the Constitution; the context of that text, including verbal and policy maxims of construction, related provisions in the Constitution or other related documents, and the

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structure of government contemplated by the Constitution; and the history surrounding the provision's drafting and ratification. Subsequent considerations involve matters that occur after the constitutional provision is ratified. These include the sub-categories of (a) subsequent events, which involve legislative, executive, and social practice under the Constitution, and judicial precedent interpreting the Constitution, and (b) prudential considerations, which involve judicial speculation concerning the consequences of any particular judicial construction, including arguments of justice or sound social policy.

These sources can also be organized by resort to whether they involve relatively specific and limited interpretive tasks, or resort to more general kinds of reasoning. Specific interpretive tasks involve more direct kinds of reasoning, such as determining the plain meaning of text or the specific historical intent of the framers and ratifiers. More general reasoning involves such considerations as reasoning from the purpose behind why text was adopted, or reasoning from general historical background about the intent of the framers and ratifiers. Table 1 may help make clearer the discussion in the rest of this section.124

124 See generally Charles D. Kelso & R. Randall Kelso, THE PATH OF CONSTITUTIONAL LAW Ch. 5 (2007) (E-Treatise available at vandeplaspublishing.com), citing, inter alia, Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (discussing 7 factors of judicial restraint, including the Court will not “anticipate a question of constitutional law in advance of the necessity of deciding it”; will not “formulate a rule of constitutional law broader than required by the precise facts to which it is to be applied”; will not pass upon the validity of a statute upon complaint of one who fails to show he is injured by its operation; and “will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.”).
Table 1
Sources of Constitutional Meaning

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<tr>
<td>(1c) Purpose/History (e.g., sensitivity to the needs of government)</td>
<td>(4) Justice and/or Social Policy Not So Embedded</td>
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The remainder of Part IV of this article will discuss in order the natural law approach to text, context, history, practice, precedents, and prudential considerations.

A. Text

The natural law approach toward interpretation was the predominant approach to interpretation at our Nation’s founding, and was adhered to by such notable early Justices as Chief Justice Marshall and Justice Story. Under that approach, the "intent" of the Constitution is not the subjective "intent" of the minds of the framers, but rather the "intent" gleaned from applying traditional modes and canons of construction to the document’s text. These modes and canons of construction are what define the natural law method of interpretation.\textsuperscript{125}

\textsuperscript{125} See Leslie F. Goldstein, \textit{In Defense of Text} 7-33 (1991); H. Jefferson Powell, \textit{The Original Understanding of Original Intent}, 98 Harv. L. Rev. 885, 887-902 (1985) (reviewing various judicial methods concerning intent, and arguing that the framers and ratifiers did not expect the Constitution to be interpreted according to their personal intentions).
The natural law decisionmaking style emphasizes the importance of a provision's purpose. As Professor Michael Moore wrote in *A Natural Law Theory of Interpretation*, "Once a judge determines the ordinary meaning of the words that make up a text and modifies that ordinary meaning with any statutory definitions or case law developments, there is still at least one more task. A judge must check the provisional interpretation from these ingredients with an idea how well such an interpretation serves the purpose of the rule in question. The necessity for asking this question of purpose Lon Fuller made familiar to us in his famous 1958 debate with H.L.A. Hart."\(^\text{126}\)

The rules of interpretation ordinarily followed in the 18\(^{th}\) century and early 19\(^{th}\) century reflected this approach. As Professor William Crosskey wrote about interpretation in the 18\(^{th}\) century, "[T]he over-all purpose of a document was stated carefully in general terms; details were put in, only where, for some particular reason, details seem required; and the rest was left to the rules of interpretation customarily followed by the courts."\(^\text{127}\) This focus on a provision's purpose was most famously stated in "The Rule of Heydon's Case" in 1584. In *Heydon's Case*, Lord Coke stated that a judge should inquire into the "mischief and defect" that the drafter was seeking to remedy and "the true reason for the remedy," and the judge should "make such construction as shall suppress the mischief, advance the remedy, and to suppress subtle invention and evasions for continuance of the mischief . . . and to add force to the cure and remedy, according to the true intent of makers of the act."\(^\text{128}\)


\(^{128}\) 76 Eng. Rptr. 637, 638 (1584).
Given this understanding, a natural law Justice must remain faithful to both the literal text and purpose of constitutional provisions when considering liberty interests involved in cases before the Court. For example, in *Boumediene v. Bush*, a 5-4 Court, per Justice Kennedy, held that aliens designated as enemy combatants and detained at Guantanamo Bay have the right of habeas corpus. In his dissent, joined by Chief Justice Roberts and Justices Thomas and Alito, Justice Scalia concluded, in part, that the writ of habeas corpus does not run in favor of aliens who have never been within the “territorial jurisdiction” of the United States, and Guantanamo Bay is not “literally” United States territory. That, Scalia said, should end the matter.

In response, Justice Kennedy looked to the purposes of “habeas corpus” and the reference in prior cases to “territorial jurisdiction.” With regard to habeas corpus, Justice Kennedy noted:

(1) “The [Habeas Corpus] Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty.”

(2) “[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers.”

(3) “The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.”

With regard to the purpose of references in prior cases to “territorial jurisdiction,” Justice Kennedy said those references were intended to be part of a “functional” test to determine

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130 *Id.* at 2296-2302 (Scalia, J., joined by Roberts, C.J., and Thomas & Alito, JJ., dissenting).
131 *Id.* at 2247.
132 *Id.* at 2259.
133 *Id.* at 2277.
whether habeas corpus is available. Under such a test, the Court should consider the objective
degree of control over the location, the practicability of having a trial there, and the availability
of possible alternatives. Under this functional test, *de jure* sovereignty is a factor that bears on
the applicability of constitutional guarantees, but questions of extraterritoriality turn on objective
factors and practical concerns, not literalism – and the United States has practical control over
Guantanamo Bay. Thus, based on this analysis of purpose, the right of habeas corpus was held
to apply in the case.\footnote{Id. at 2253-62.}

**B. Context**

After consideration of text, the next question to ask from the perspective of natural law
interpretation concerns the role of context in constitutional interpretation, and the interplay
among text, purpose, and context. As Justice Story noted in 1833 in *Commentaries on the
Constitution of the United States*, "In construing the constitution of the United States, we
are, in the first instance, to consider, what are its nature and objects, its scope and design, as
apparent from the structure of the instrument, viewed as a whole, and also viewed in its
component parts."\footnote{Story, supra note 122, § 405.}

With regard to the elements of structure – issues of separation of powers, federalism, and
the proper role for the courts – the 18\textsuperscript{th}-century natural law approach embraced a sharing of
powers, checks and balances approach toward separation of powers; a balanced approach toward
federal versus state governmental power, which nonetheless acknowledged the need for a strong
federal government; and a view that the role of the courts was to hold governmental actions
unconstitutional if, on balance, the government violated constitutional limitations.
As Justices O’Connor and Kennedy have noted, this approach does not adopt a static view of the Constitution. Thus, regarding federalism issues, they noted in *United States v. Lopez*, “The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses: first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities. Yet the powers conferred on the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government’s role.”

Reflecting a balanced approach between federal and state governmental power, Justice Kennedy discussed in his concurrence in *U.S. Term Limits, Inc. v. Thornton* that the framers and ratifiers adopted a dual theory of sovereignty, “establishing two orders of government, each with its own direct relationship, its own privity, and its own set of mutual rights and obligations to the people who sustain it and are governed by it.” Justice Kennedy added that this theory was embraced by the Court in 1819 in *McCulloch v. Maryland*. Commentators from a more states’ rights perspective have criticized Justice Kennedy on the grounds that this theory of federalism is not as deferential to state governments as was Chief Justice Rehnquist’s approach.

The natural law approach to separation of powers was stated by Justice Story in 1833. He said, “[Separation of powers] is not meant to affirm, that [the three branches] must be kept

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wholly separate and distinct, and have no common link or connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands, which possess the whole power of either of the other departments. . . .; and, as a corollary, that, in reference to each other, neither of them ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.”

Regarding judicial review, Chief Justice Marshall noted in the famous case of *Marbury v. Madison* that under the American theory of separation of powers, it is the emphatically the province of the judiciary to say “what the law is,” and the Constitution is just as much “law” as statutes or the common law. If two laws conflict, the courts must decide how each operates, and the Constitution is superior to law repugnant to it. Chief Justice Marshall noted that all those who have framed written constitutions contemplate them as forming the paramount law, and thus the courts have a duty to hold governmental actions unconstitutional if, on balance, the courts conclude that the governmental action violates constitutional mandates. This approach underscores the primacy of the Court in determining the meaning of constitutional provisions, as reflected in cases such as *Boerne v. Flores*.

**C. History**

With regard to history, a natural law approach should be willing to examine historical sources to help determine a provision's purpose, because a natural law approach is sensitive to a provision's purpose, as noted in section A above. However, the prevailing mode of

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139 Story, *supra* note 122, § 525.
140 *Marbury v. Madison*, 1 Cranch 137, 177-78 (1803).
141 *See supra* text accompanying notes 100-06.
142 *See supra* text accompanying notes 126-34.
interpretation in the United States and England in the late 18\textsuperscript{th} and early 19\textsuperscript{th} century took the view that it was improper to consider the legislative history of a provision to help determine a provision's meaning. Thus, notes of the Constitutional Convention, or statements made on the floor of the House and Senate during consideration of the first 10 amendments, were not proper to consider, while contemporaneous statements about the meaning of the Constitution that were not part of the formal legislative history, but were part of the public dialogue prior to ratification, like \textit{The Federalist Papers}, were proper to consider.\textsuperscript{143}

This limitation gradually died out during the 19\textsuperscript{th} century in America.\textsuperscript{144} Because this limitation died out, Notes of the Constitutional Convention, or House or Senate statements about constitutional amendments, became proper to use as history to determine the framers and ratifiers' intent during the second half of the 19\textsuperscript{th} century. Early natural law opinions are thus more "textualist" than later natural law opinions, which involve more historical "originalism."\textsuperscript{145} Given this evolution concerning the appropriate use of constitutional or legislative history to determine the framers and ratifier's intent, the disagreements among commentators over court use of such material in the 18\textsuperscript{th} century and the post-revolutionary war period are of historical interest, but no real jurisprudential interest. All commentators agree that during the 19\textsuperscript{th} century


\textsuperscript{144} \textit{See} Baade, \textit{supra} note 143, at 1043-62.

\textsuperscript{145} \textit{See}, e.g., Daniel A. Farber, William N. Eskridge, Jr. & Phillip Frickey, \textit{Themes for the Constitution’s Third Century} 77-78 (1\textsuperscript{st} ed. 1993) (discussing the early "textualist" nature of Chief Justice Marshall’s Supreme Court opinions).
the history surrounding adoption of the Constitution and later constitutional amendments became appropriate to use as an aid in determining the framers and ratifiers' intent.\footnote{See generally Powell, \textit{supra} note 125, at 935-44; Baade, \textit{supra} note 143, at 1043-62; Raoul Berger, \textit{Original Intent: The Rage of Hans Baade}, 71 N.C. L. Rev. 1151, 1156-68 (1993) (courts’ use of history); Louis J. Sirico, Jr., \textit{Original Intent in the First Congress}, 71 Mo. L. Rev. 687 (2006) (intent of framers and ratifiers considered, particularly to illuminate general purposes).}

With regard to whether a natural law judge would focus on the specific examples held by the framers and ratifiers about a provision, or their general concepts, the answer depends in part on the provision. To the extent the provision is "relatively direct, specific, and focused," history may suggest that the framers and ratifiers intended the provision to reflect only detailed, specific choices. If so, judges should remain focused on those choices because by "implementing the intent of the Framers, the Court is supposedly not imposing its own vision of policy, but only requiring current majorities to bow to the original deal, to which we have all implicitly consented."\footnote{Farber, Eskridge & Frickey, \textit{supra} note 145, at 77-79.} Of course, even if “some of the Framers addressed specific issues in clear terms, there remains the problem of aggregating individual views into the collective views of a diverse group of individuals. Different [Framers] may not have agreed with each other on their interpretation of a provision.”\footnote{\textit{Id.} at 78.} On the other hand, where history suggests the framers and ratifiers embedded in the Constitution broad natural law concepts, like those dealing with the First Amendment, Equal Protection Clause, and Due Process Clause, history may suggest that the framers and ratifiers intended "to provide no hard-and-fast answers . . . , and to let the answers develop over time in common-law fashion," against a general background of principles of justice derived from political and moral philosophy embedded in the law.\footnote{\textit{Id.} at 78-81.}
In short, the natural law style of interpretation will consider *both* the specific intent of the framers and ratifiers about a constitutional provision *and* any general legal concept used by the framers and ratifiers in constitutional text to help determine constitutional meaning. In contrast, a formalist approach, such as that adopted by Justice Scalia, focuses much more on the framers and ratifiers' specific intent about the provision's meaning, not its general concept.\(^{150}\) As phrased by Professor Leslie Goldstein, "[Chief Justice] Marshall carefully distinguished between the conscious, specific, policy goal that may have motivated a particular constitutional clause, on the one hand, and the broader, more generalized principle, or rule of law, that the clause established, on the other hand. For Marshall, constitutional law consisted of the latter rather than the former. For [formalists] the choice is the reverse."\(^{151}\)

A similar point has been noted by Professor Rodney Smith. He stated, "[Formalists, such as Justice Scalia] examine the text, history and structure of the Bill of Rights to ascertain whether those sources resolve specific questions. Not surprisingly, it is exceedingly rare to find that those sources yield specific interpretive answers to specific questions. The framers of the Constitution, the Bill of Rights and the Civil Rights Amendments largely were natural lawyers, who espoused broad principles and often eschewed the call to resolve specific issues in a specific manner within the Constitution."\(^{152}\)

For example, most modern judges in the natural law judicial decisionmaking tradition view the Establishment Clause as reflecting an Enlightenment-based natural law concept of separation of church and state. As Justice Kennedy stated in *Lee v. Weisman*, "[T]he lesson of

\(^{150}\) See Baade, supra note 143, at 1034-35; Powell, supra note 125, at 894-902.

\(^{151}\) Goldstein, supra note 125, at 9.

history that was and is the inspiration for the Establishment Clause [is] the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce."\(^{153}\) Justice Souter, concurring, remarked, "[T]he Framers were vividly familiar with efforts in the Colonies and, later, the States to impose general, nondenominational assessments and other incidents of ostensibly ecumenical establishments," and the Framers intended the Establishment Clause to condemn "all [such] establishments, however nonpreferentialist."\(^{154}\) That concept would counsel a judge to find unconstitutional practices such as officially organized prayer in public schools, despite the fact that such prayer was a specific example thought constitutional by the framers and ratifiers as determined by "historical practices and understandings."\(^{155}\)

D. Practice

The 18\(^{th}\)-century mode of interpretation treated a reasoned elaboration of precedents, or repeated legislative or executive practice, as a gloss on meaning. As Professor Jefferson Powell has observed, "[Madison] consistently thought that '\textit{usus},' the exposition of the Constitution provided by actual governmental practice and judicial precedents, could 'settle the meaning and the intention of the authors.'"\(^{156}\) In 1833, Justice Story similarly supported the practice of drawing inferences from congressional, executive, and state acquiescence in "more than forty

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\(^{153}\) 505 U.S. 577, 591-92 (1992) (Kennedy, J., for the Court).

\(^{154}\) \textit{Id.} at 615 (Souter, J., joined by Stevens & O'Connor, JJ., concurring).

\(^{155}\) \textit{Id.} at 631-32 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting).

years" of "operation" under the Constitution, and from the "practical exposition of the
government itself."\textsuperscript{157}

\textit{McCulloch v. Maryland} provides a good example of this principle at work. Based upon
legislative and executive practice Madison changed his position between 1791 and 1816 on the
constitutionality of Congress incorporating a national bank. The Supreme Court noted the
legislative and executive practice, and subsequent judicial practice, stating in \textit{McCulloch}, "The
principle now contested was introduced at a very early period of our history, has been recognized
by many successive legislatures, and has been acted upon by the judicial department, in cases of
peculiar delicacy, as a law of undoubted obligation."\textsuperscript{158}

The Court also paid deference to legislative practice in \textit{Martin v. Hunter's Lessee} and
\textit{Gibbons v. Ogden}. In \textit{Hunter's Lessee}, the Court stated, "Hence [the Constitution's] powers are
expressed in general terms, leaving to the legislature, from time to time, to adopt its own means
to effectuate legitimate objects, and to mold and model the exercise of its powers, as its own
wisdom and the public interests should require."\textsuperscript{159} In \textit{Gibbons}, the Court stated, "If commerce
does not include navigation, the government of the Union has no direct power over that subject .
. . . Yet this power has been exercised from the commencement of the government, has been
exercised with the consent of all, and has been understood by all to be a commercial
regulation."\textsuperscript{160}

\begin{footnotes}
\item[157] Story, \textit{supra} note 122, § 391, 408.
\item[158] 17 U.S. (4 Wheat.) 316, 401 (1819). For a fuller discussion of James Madison's
change in position between 1791 and 1816 on the constitutionality of Congress incorporating a
national bank, see Kelso & Kelso, \textit{supra} note 124, at 707.
\item[159] 14 U.S. (1 Wheat.) 304, 326-27 (1816).
\item[160] 22 U.S. (9 Wheat.) 1, 186-90 (1824).
\end{footnotes}
A good example of the Court, including Justice Kennedy, limiting a possible liberty right based upon legislative and executive practice is *Washington v. Glucksberg*.\(^{161}\) There, Chief Justice Rehnquist wrote for the Court that an asserted right to assistance in committing suicide is not a fundamental liberty interest. He noted, “Throughout the nation, Americans are engaged in an earnest and profound debate about the morality, legality and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”\(^{162}\)

In *Compassion in Dying v. State of Washington*, the Ninth Circuit Court of Appeals had held that there was a constitutional right to physician-assisted suicide, reasoning that such a right was “similar” to the fundamental rights discussed in *Planned Parenthood v. Casey*, based on *Casey*’s language that at “the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”\(^{163}\) The Supreme Court reversed, stating that any such “similarity” was not sufficient to recognize such a new constitutional right in this case.

The Court noted in *Glucksberg* that no text, context, or history of the 14\(^{th}\) Amendment supported a right to physician-assisted suicide, and that legislative and executive practice in 49 of the 50 States, with the exception of Oregon, rejected such a right.\(^{164}\) Even general social practices in other Western industrialized countries, with rare exceptions, refused to grant such a right.\(^{165}\) As Justice Stevens noted in his concurrence in the case, prudential considerations also

\(^{161}\) 521 U.S. 702 (1997).

\(^{162}\) *Id.* at 735.


\(^{164}\) 521 U.S. at 710-18.

\(^{165}\) *Id.* at 718 n.16, 734-35.
do not clearly support such a right because the “value to others of a person’s life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life.”\textsuperscript{166} With respect to \textit{Casey}’s definition of liberty, which could be used as a springboard to expand the list of fundamental privacy rights, Chief Justice Rehnquist said of the \textit{Casey} definition of liberty:

\begin{quote}
By choosing this language, the Court’s opinion in \textit{Casey} described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment . . . That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.\textsuperscript{167}
\end{quote}

Thus, in \textit{Glucksberg}, the other sources of constitutional interpretation – text, context, history, practice, and prudential considerations, as well as the core holdings of precedent which had never supported such a right to physician-assisted suicide – were more weighty than any general reasoning about moral rights based upon the \textit{Casey} precedent’s “heart of liberty” language.

More generally, in deciding in individual cases whether to rule unconstitutional some custom or tradition, based on its inconsistency with an enlightened understanding of liberty, the Court has balanced arguments of historical customs and legislative and executive traditions with natural law respect for a reasoned elaboration of precedent. Perhaps the Court’s experience with societal resistance after 1954 to implementing \textit{Brown v. Board of Education}\textsuperscript{168} has cautioned the

\begin{itemize}
\item \textsuperscript{166} \textit{Id.} at 741 (Stevens, J., concurring in the judgment).
\item \textsuperscript{167} \textit{Id.} at 727.
\end{itemize}
Court not to get too far out in front of society in implementing moral notions regarding liberty. For example, it was only when 16 states still had laws against interracial marriage that the Court struck them down as unconstitutional in 1967 in *Loving v. Virginia*.\(^{169}\) Similarly, the Court created intermediate scrutiny for gender discrimination on its own in 1976 in *Craig v. Boren*,\(^{170}\) against a background of 35 states ratifying the Equal Rights Amendment, a substantial number of states, although not the 38 states needed for a 3/4 majority of the states required for formal approval of the Equal Rights Amendment. All states had laws against sodomy in 1960 and 24 states had such laws in 1986 when they were upheld in *Bowers v. Hardwick*.\(^{171}\) In contrast, only 13 states still had such laws in 2003 when the Court ruled them unconstitutional in *Lawrence v. Texas*.\(^{172}\) Similarly, it was only when 20 or fewer states still applied the death penalty to mentally retarded individuals or juveniles that the Supreme Court ruled those unconstitutional after 2000 in *Atkins v. Virginia*\(^{173}\) and *Roper v. Simmons*.\(^{174}\)

In particular, the Court noted in *Roper* that among the 50 states, 12 bar executions altogether and 18 bar executions of all persons under 18 years of age. Thus, at the time *Roper* was decided, only 20 states permitted executions of juveniles in some circumstances, and even in those states imposition had become truly unusual. Further, since 1989, no state had changed their law to impose the death penalty on juveniles, and 5 states had banned it either by legislation

\(^{169}\) 388 U.S. 1, 5 n.4, 9-11 (1967) (citations omitted).

\(^{170}\) 429 U.S. 190, 197 (1976)


\(^{172}\) 539 U.S. 558, 566-72, 575 (2003).


\(^{174}\) 543 U.S. 551 (2005) (death penalty unconstitutional applied to minors).
or state constitutional law. The Court also noted that no other country on earth authorizes a juvenile death penalty.175

Similarly, the Court noted in Atkins:

Additional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. . . . [R]epresentatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an amicus curiae brief explaining that even though their views about the death penalty differ, they all “share a conviction that the execution of persons with mental retardation cannot be morally justified.” Moreover, within the world community, the imposition of the death penalty for crimes committed by the mentally retarded is overwhelmingly disapproved. Finally, polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong. . . . Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.176

On the other hand, where legislative and executive practice is more common, a finding of unconstitutionality is less likely. For example, given the strong legislative and executive practice in the United States regarding bans on same-sex marriage, it is likely that Justice Kennedy would not currently find such laws unconstitutional, despite an argument that could be made based upon an enlightened concept of liberty, as elaborated in Western European practice.177

The case for the constitutionality of life imprisonment without parole for juveniles is closer. Justice Kennedy observed in Roper that juveniles “cannot with reliability be classified among the worst offenders” because of “a lack of maturity and an underdeveloped sense of

175 Id. at 560-78.

176 536 U.S. at 316 n.21.

177 Only five states currently permit same-sex marriages – Vermont, New Hampshire, Massachusetts, Connecticut, and Iowa – while a number of other states recognize domestic partnerships that give the individuals many of the rights incident to marriage. See generally National Conference of State Legislatures, Same Sex Marriage, Civil Unions and Domestic Partnerships (2008) (http://www.ncsl.org, Search “same-sex marriage and domestic partnerships”). In European countries, same-sex marriage is becoming more common. See Katharina Boele-Woelki, The Legal Recognition of Same-Sex Relationships Within the European Union, 82 Tul. L. Rev. 1949 (2008).
responsibility”; “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; and the “personality traits of juveniles are more transitory, less fixed.” These observations support the notion that life imprisonment without parole is a form of punishment not appropriate for juvenile offenders, particularly for non-homicide offenses. Regarding legislative and executive practice, as of May, 2010, only 12 states had 129 juveniles total sentenced to such terms of imprisonment for non-homicide offenses, while such imprisonment was legislatively authorized in 37 states and the District of Columbia. Thus, legislative authorization supports the constitutionality of such a statute, while actual practice suggests the case is similar to Roper. In Graham v. Florida, Justice Kennedy joined with Justices Stevens, Ginsburg, Breyer, and Sotomayor to hold life imprisonment without parole for juveniles for non-homicide offenses was unconstitutional, following a Roper-like analysis.

E. Precedent

The natural law approach to interpretation shares the general practice of the Court in following precedents which are viewed as “settled law” or on which there has been “substantial reliance.” For example, overruling Metro Broadcasting, Inc. v. FCC in Adarand Constructors, Inc. v. Pena, Justice O’Connor noted:

178 Roper, 543 U.S. at 569-70.
179 Graham v. Florida, 130 S. Ct. 2011, 2023-25, 2034-35 (2010) (Kennedy, J., for the Court, including Appendix to the Court’s opinion).
180 Id. at 2021-34.
It is worth pointing out the difference between the application of stare decisis in this case and in Planned Parenthood of Southeastern Pa. v. Casey. Casey explained how consideration of stare decisis informs the decision whether to overrule a long-established precedent that has become integrated into the fabric of the law ["settled law"]. Overruling precedent of that kind naturally may have consequences for "the ideal of the rule of law." In addition, such precedent is likely to have engendered substantial reliance, as was true in Casey itself. . . But in this case . . . we do not face a precedent of that kind, because Metro Broadcasting itself departed from our prior cases – and did so quite recently. By refusing to follow Metro Broadcasting, then, we do not depart from the fabric of the law; we restore it.182

In their concurrence in United States v. Lopez, Justices Kennedy and O'Connor spoke forcefully about the wisdom of following precedents with respect to the Commerce Clause. They noted, "[T]he Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. . . . That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy . . . . Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy."183

In addition, under a natural law approach to interpretation, a sequence of judicial precedents interpreting a provision can provide a "gloss" on meaning that can modify the framers and ratifiers' initial specific views. As Professor Powell has noted when discussing the writings of James Madison, under the traditional natural law model, "'usus', the exposition of the Constitution provided by actual governmental practice and judicial precedents could 'settle the meaning and intention of the authors.' Here, too,


[Madison] was building on a traditional foundation: the common law had regarded usage as valid evidence of the meaning of ancient instruments, and had regarded judicial determinations of the meaning even more highly. As Madison himself said in THE FEDERALIST PAPERS No. 37, “All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”

In his writing, Professor Dworkin has called this use of precedent the “gravitational force” of precedent, in addition to a precedent’s “enactment force.” In Dworkin’s terminology, the “enactment force” of a precedent focuses on the narrow question of whether to follow an incorrect interpretation under the doctrine of *stare decisis* based upon practical reasons. Some of these practical reasons are “‘convenience, reliance on accumulated experience, and the usefulness for planning of being able to predict what a court will decide.’”

The “gravitational force” of a precedent, however, arises from “‘the notion of justice that like cases should be treated alike.’” This “gravitational force” of a precedent enters into the initial interpretation of what the correct interpretation is, as its

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184 Powell, *supra* note 125, at 939.

185 THE FEDERALIST PAPERS No. 37 (Madison).


focus is on “what a chain of precedents requires when properly understood.”\footnote{188} This view of reasoned elaboration of the law, where the general reasoning of prior cases exerts an influence on what the doctrine means today, independent of the “enactment force” of the precedent’s core holding, is, according to Dworkin, a “distinctive fact about common law adjudication.”\footnote{189} More generally, it is a distinctive fact about constitutional law adjudication when in a common-law mode, as for interpretation of broad concepts placed into the Constitution, where there is a “good deal of the common law type of reasoning in constitutional cases”\footnote{190} based on the view that the framers and ratifiers, based on their natural law beliefs, intended “the answers to develop over time in common-law fashion.”\footnote{191}

Because they were immersed in the Anglo-American system of judicial decisionmaking, the framers and ratifiers’ views concerning text, context, history, practice, and precedent were grounded in the grand traditions of the Anglo-American common law system. This approach favors principles such as reasoned elaboration of the law, fidelity to precedent, deciding cases on narrower grounds where possible, deciding most cases only after full briefing and argument, and the \textit{Ashwander} principles of judicial restraint.\footnote{192} The increased attention since Justice Kennedy’s service on the Court to the

\begin{footnotesize}
\footnote{188} Dworkin, \textit{supra} note 186, at 1231.
\footnote{189} \textit{Id.} at 1230.
\footnote{191} Farber, Eskridge & Frickey, \textit{supra} note 145, at 79.
\footnote{192} See generally Harry W. Jones, \textit{Our Uncommon Common Law}, 42 Tenn. L. Rev. 443, 450-63 (1975); Charles Fried, \textit{The Artificial Reason of the Law, or What Lawyers Know}, 60 Tex. L. Rev. 35, 38-49 (1981); Church of the Lukumi Babalu Aye,
principle regarding deciding cases on narrower, more fact-specific grounds has been
called “judicial minimalism” by Professor Cass Sunstein. He has noted that such
“minimalism” is most useful in giving flexibility to politically accountable officials in
difficult cases at the frontiers of constitutional law where judges would do best to avoid
firm rules that they might come to regret.193

In part, the principle of "reasoned elaboration" includes clearly defined tests that
work in practice; coherence and consistency in legal categories; and avoidance of
functional balancing tests that are situation-specific and not easily reconcilable with other
aspects of legal doctrine, unless contemporaneous sources and subsequent events
mandate use of such tests. These notions are implicit in the discussion of precedent
section of Planned Parenthood v. Casey for determining when a judge who treats a
sequence of precedents as a gloss on meaning, as does a natural law judge, should find
the extra impetus to overrule: (1) the precedent is unworkable in practice; (2) the
precedent creates an inconsistency or incoherence in the law; (3) a changed
understanding of facts has undermined the factual basis of the precedent; (4) the
precedent represents a substantially wrong or substantially unjust interpretation of the
Constitution, often because the opinion represents unsound reasoning; or (5) the

Inc. v. Hialeah, Fla., 508 U.S. 520, 571-76 (Souter, J., concurring) (discussing deciding
cases on narrower grounds, the importance of full briefing and argument, and reasoned
and consistent elaboration of the law); Ashwander v. Tennessee Valley Authority, 297
U.S. 288, 346-48 (1936) (the Ashwander principles are discussed supra note 124).

193 See Cass R. Sunstein, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE
SUPREME COURT (1999); Cass R. Sunstein, Problems with Minimalism, 58 Stan. L. Rev.
precedent raises concerns about a commitment to the "rule of law."194 Reasoned elaboration of the law would also include, in some version, commitment to developing the law according to "neutral principles."195

F. Prudential Considerations

Two approaches could be taken under a natural law approach toward the appropriateness of using prudential considerations of sound social policy in the act of constitutional interpretation. One view is to embrace such social policy review. Under this approach, whether or not the framers and ratifiers of the Constitution intended each clause to embody some sound natural law principle, judges should take that view today. Thus, judges should always read the Constitution's words against the backdrop of natural law theory. This approach would require judges to pay great respect to the ordinary meaning and purpose of the words used in the Constitution. However, under this approach, judges would always be permitted to resort to natural law philosophy in the final instance "so as to check meaning and purpose by an all-things-considered value judgment that acts as a safety-valve against wildly absurd or unjust results."196


In its most extreme form, such an approach to judicial decisionmaking would place judges in the role of Platonic Guardians, deciding constitutional cases in order to promote the judge's natural law vision of the "just state." This extreme form was criticized by Judge Learned Hand in his famous Oliver Wendell Holmes, Jr. Lecture at Harvard in 1958. As Judge Hand stated, "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."197 Most judges and commentators who subscribe to some version of natural law theory reject this approach. However, some commentators seem to embrace it.198

A second approach, more consistent with the “social contract” natural law approach to judicial decisionmaking dominant during the framing and ratifying of our Constitution, holds that judges should resort to natural law principles in interpreting the Constitution only to the extent that particular clauses of the Constitution were drafted with natural law principles in mind.199 Under this approach, where clear constitutional provisions do not reflect a sound natural law position, as in the case of slavery in the

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199 Michael S. Moore, Do We Have An Unwritten Constitution, 63 S. Cal. L. Rev. 107, 133-37 & n.71 (1989).
United States before the 13\textsuperscript{th} Amendment, judges should follow the meaning of the Constitution until the natural law position is properly added to the document.\textsuperscript{200}

One variation of this approach would permit judges to resort to constitutional principles outside those stated in the Constitution to the extent that a case can be made that the framers and ratifiers themselves intended judges to resort to natural law principles outside the written text of the Constitution to supplement it.\textsuperscript{201} A more limited variation would require judges to stick to natural law principles actually embedded in the text of the Constitution. Both of these natural law variations, however, agree that the major provisions of the Bill of Rights and the Civil War Amendments were drafted with the belief that the principles they embodied reflected natural law.

No Supreme Court Justice in our history has explicitly adopted the "Platonic Guardian" model of judicial decisionmaking, including no Justice who has adopted a natural law judicial decisionmaking style. The closest a sitting Justice may have come to such an approach is Justice Chase's opinion in the classic 1798 case of \textit{Calder v. Bull},\textsuperscript{202} a


\textsuperscript{202} 3 U.S. 386, 387-89 (1798) (Chase, J., opinion); id. at 395-401 (opinions of Patterson, Iredell & Cushing, JJ.). The case was argued in the absence of Chief Justice Ellsworth.
view that was rejected by a majority of the Court. Professor Jefferson Powell has noted about the case, “Chase went out of his way to stress that constitutional argument was not limited to interpretation of the constitutional text: ‘I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law.’”

Even Chase’s opinion, however, is perhaps best understood as an example of the natural law variation of resorting only to natural law principles outside the text of the Constitution that the framers and ratifiers intended judges to adopt. Professor Powell has noted, “Chase expressly based [his] conclusion on the liberal principle that governmental authority is derived from the consent to the social contract, and that consent to certain governmental actions could never be inferred.”

More generally, the natural law tradition of our society has adopted the variation requiring judges to stick to natural law principles actually embedded in the text of the Constitution. This was the Marshall Court's approach to slavery: if the Constitution has clearly adopted an unsound position from the perspective of natural law, it is up to legislative action, constitutional amendment, or the people's reserved right of revolution, to correct the problem. It may be remembered that Locke’s view was that government “is established by society, and may therefore be disestablished by it. But who is to judge when the government has betrayed its trust to the extent necessary to justify an act of

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203 Powell, supra note 4, at 103.

204 Id. For state court decisions of the same era that take an approach similar to that of Justice Chase, see Suzanna Sherry, Natural Law in the States, 61 U. Cin. L. Rev. 171, 183-96 (1992).
revolution? Locke answers, "the people." Under this view, judges should only enforce the natural law principles placed into the Constitution by the framers and ratifiers, with the people's reserved right of revolution perhaps textually recognized by the reservation of other rights "to the people" in the Ninth Amendment.

Under this view, a natural law judge should reject use of general sound social policy argumentation, believing that balancing policy arguments is appropriate for the legislative and executive branches of government, not the judicial branch. On the other hand, in determining the content of natural law principles reflected in constitutional text, natural law judges should consider the consequences of the decision in terms of whether the natural law principle would be advanced or retarded. As Professor Dworkin has noted, natural law reliance on principles, but not policies, is perfectly consistent with considering the consequences of a judicial decision, and that decision’s impact on the advancement of those natural law principles.

V. Conclusion

Justice Kennedy seems determined to strike an appropriate balance between the exercise of government power and the need for individuals to have as much liberty as can reasonably be protected against government power. Justice Kennedy’s vision of liberty embodied in the Constitution seems to derive from an understanding of 18th-century Enlightenment philosophy, based on writers such as John Locke and Adam Smith, as developed in the 19th century by writers such as John Stuart Mill. Understanding this

205 Huntington Cairns, Legal Philosophy from Plato to Hegel 336 (1949), citing John Locke, Second Treatise on Government 240 (1690)

206 Dworkin, supra note 186, at 1204-23.
tradition, as modified by the other restraints of a natural law theory of judicial
decisionmaking, is important to understanding how Justice Kennedy decides cases.

In pursuit of this understanding, Part II of this article discussed the Enlightenment
concept of liberty. Part III then showed how that doctrine is reflected in the reasoning of
opinions written by Justice Kennedy, with specific reference to cases involving freedom
of speech, individual autonomy, individual liberty versus government liberty, and
international views on liberty. Part IV addressed other aspects of a natural law theory of
interpretation – text, context, history, legislative and executive practice, precedent, and
prudential considerations – that limit full elaboration of this concept of liberty in specific
cases.